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No. 71-684

IN THE

Supreme Court of the United States

October Term, 1971

CITY OF COLUMBUS, OHIO, ET AL.,
Petitioners,

v.

FRANK W. BOWER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioners[1] pray that a writ of certiorari issue to review the decision of the Supreme Court of Ohio, entered in the above entitled case on June 30, 1971.

CITATION OF OPINION BELOW

The written opinion of the Ohio Supreme Court can be found reprinted in Appendix A at page 11, and is reported in 27 Ohio St. 2d 7.

JURISDICTION

The opinion of the Supreme Court of Ohio in the above entitled case was rendered on June 30, 1971. Rehearing in this case was denied on September 15, 1971. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Section 1257(3).

[1] The following are Petitioners in this cause: The City of Columbus, Ohio; M. E. Sensenbrenner, Mayor, Dr. John Rosemond, William P. Hoermle, Jerry O'Shaughnessy, Charles R. Petree, II, M. D. Portman, Roland A. Sedgwick, and Donald L. Woodland, City Council; Mrs. Helen M. VanHeyde, City Clerk.

QUESTIONS PRESENTED

1. Congress has, pursuant to the power conferred upon it by the United States Constitution and in furtherance of the several Treaties and Conventions to which the United States is a party, passed legislation establishing the sovereign territorial airspace of the United States and has granted a free right of passage to all citizens through such territory. May a political subdivision of a State be required to pay compensation to a non-owner of such territory?

2. May a political subdivision of the State be held liable for a claimed constitutional taking where it is acting on behalf of the United States, pursuant to authority conferred upon it by Congress, where the grant of such authority remains unchallenged and there is no finding that the authority conferred has been exceeded?

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The applicable constitutional provisions involved are. Article I, Section 8(3)(18); Article II, Section 2(2); Article IV, Section 3(2); and Article VI(2), all of the United States Constitution. The applicable treaty or convention provision involved is Article I, of the Pan-American Convention of 1928. The applicable statutory provisions involved are Section 6, as amended, of the Civil Aeronautics Act of 1938; Section 1108, of the Federal Aviation Act of 1958; and Section 101(24), of the Federal Aviation Act of 1958. All statutory, constitutional provisions and treaty or convention provisions referred to herein appear reprinted in full in Appendix C, at page 16.

STATEMENT

On the 31st day of December, 1970, the above action was filed as an original action in the Supreme Court of Ohio by some thirteen property owners.

In response to this complaint petitioners on the 29th day of January, 1971, filed an answer which affirmatively denied the jurisdiction of the Court to grant such a writ, since the area petitioners would be appropriating is the sovereign territory of the United States; affirmatively claimed immunity on the basis that petitioners are the agents of the United States carrying out the will of Congress, that they could only be held liable if the grant of authority had been exceeded or had not been validly conferred in the first instance by Congress, and affirmatively claimed that there was a defect of parties in that they were being asked to appropriate (acquire) an interest in the sovereign territory of the United States, and the United States with the superior interest was not a party to the action.

Petitioners on the 7th day of May, 1971, filed a motion for summary judgment together with supporting documentation by the terms of which petitioners specifically claimed, the action being at issue that they were entitled to a judgment in their favor on the basis that they were agents of the United States performing duties pursuant to authority conferred by Congress, and thus immune from liability in the absence of a showing that the authority had been exceeded or not validly conferred. Nothing was presented the Court such as would demonstrate that the authority had been exceeded and no claim was made that it had not been validly conferred. The defense of lack of jurisdiction by the Court was argued in

the brief submitted with that motion. (See motion for summary judgment and brief).

On the 28th day of May, 1971, a series of stipulations were filed which it was agreed would have no application to the determination of the motion for summary judgment.

The Supreme Court of Ohio on the 30th day of June, 1971, announced its decision which is reprinted herein in Appendix A, by the terms of which petitioners' motion for summary judgment was overruled and petitioners' defense of lack of jurisdiction held not to be valid.

The questions which are posed herein were specifically raised during the trial in petitioners' answer, in the motion for summary judgment and briefs, and in the motion for rehearing. Those questions were specifically considered and decided by the Ohio Supreme Court. See Appendix B, Entry of Certification by the Supreme Court of Ohio, entered the 5th day of November, 1971.

REASONS FOR GRANTING A WRIT

I. This Case Presents Federal Questions of First Impression in a Matter of National Sovereignty.

A Federal District Court in the recent case of *Lockheed Air Terminal v. The City of Burbank*, 11 Avi. Cas. 17850 (1970), has expressly recognized and held that the navigable air space is sovereign territory of the United States. That recognition is found in part in the following conclusions of law handed down by the Court in the Lockheed Air Terminal case, wherein at pages 17862 and 17863 of its opinion the Court concluded:

> "14. From the broad scope of the Federal statutes and regulations governing and controlling the use of air space and of air traffic, it is apparent

that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for the safe and most efficient use of such airspace. The scheme of federal regulation is so pervasive as to demonstrate that Congress intended to preempt the field and to leave no room for local ordinances such as the Burbank curfew ordinance.

"17. Each federally certificated air carrier is authorized and obligated by statute and by its Certificate of Public Convenience and Necessity to provide adequate service over its specified routes. Certificates of Public Convenience and Necessity held by the interstate air carriers cannot be revoked unless the carrier fails to comply with an order of the CAB requiring obedience to a federal rule found to have been violated. The Burbank curfew ordinance, by imposing a local veto for a period of hours over use of the navigable airspace, constitutes a restriction on carriers in fulfilling their statutory duty and is tantamount to a partial suspension of the Certificates of Public Convenience and Necessity issued to interstate air carriers operating out of Hollywood-Burbank Airport. Said ordinance is therefore in direct conflict with federal law and is void under the Supremacy Clause (Art. VI, Para. 2) of the United States Constitution.

"18. The Burbank curfew ordinance conflicts with the exercise of federal sovereignty over navigable airspace, 49 U.S.C. Sec. 1508(a), by imposing local control on its use, and, for the same reason, the ordinance conflicts with the federal right of each citizen of freedom of transit through the navigable airspace, 49 U.S.C. Section 1304, and is therefore void under the Supremacy Clause."

Petitioners have been ordered to use their power of eminent domain to pay compensation to a non-owner for a property interest they can never possess, and over which they can never exercise any of the incidents of ownership. In light of the pronouncements in the *Lockheed Air Terminal* case, supra, the conclusion is supportable that the order of the Supreme Court of Ohio, in the context of the previously mentioned scheme of Constitutional, Treaty or Convention, and statutory provisions amounts to a denial of the fact of sovereign supremacy.

This case, in light of the *Lockheed Air Terminal* case, *supra*, presents the first case in which the statutes previously referred to, have been presented to this Honorable Court in the context of the Constitutional and Treaty or Convention provisions which form the foundation for their passage. It is, therefore, petitioners' belief that the questions posed herein, as passed upon by the Supreme Court of Ohio (See Appendix B, Entry of Certification), in fact, present questions of first impression in an area where both the scope, application and meaning of the statutes remain open and unresolved by this Honorable Court.

The Supreme Court of Ohio, as shown by its decision is taking the position that these specific questions were considered and decided by this Honorable Court in the case of *Griggs v. Allegheny County*, 369 U.S. 84, 7 L. Ed. 2d 585. A study of the *Griggs* case, and the background of the case does not disclose that these specific questions were raised or that they could have been raised and litigated in that case; and it is clear that they were not specifically passed upon by this Honorable Court. Therefore, the Supreme Court of Ohio by its decision announced in this case is expanding the decision announced in the

Griggs case, *supra*, beyond the issues in fact presented for determination. In actuality the scope, application and meaning of the provisions of the Federal Aviation Act of 1958, previously referred to herein, remains an unsettled Federal question, since the *Griggs* case, *supra*, arose and was litigated under the Civil Aeronautics Act of 1938. The unsettled nature of the question becomes apparent when the conclusion of the Ohio Supreme Court that petitioners have not only a right, but a duty to appropriate (acquire) a property interest in the navigable airspace, is compared with the conclusion of the District court in the *Lockheed Air Terminal* case, *supra*, namely, that persons such as petitioners can acquire no incidence of ownership in this territory.

Apart from the Constitutional, Treaty or Convention and Statutory provisions previously cited herein, the significance and importance of the first question becomes further apparent when the question is considered in the light of the Constitutional principle announced in *Missouri v. Holland*, 252 U.S. 416, wherein Justice Holmes at pages 432, and 433, of the opinion points out:

> "* * * If the treaty is valid, there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the government. * * *"
>
> "* * *
>
> "* * *
>
> "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. * * * *It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed*

*that, in matters requiring national action, 'a power which must belong to and somewhere reside in every privileged government' is not to be found * * *."*

The Supreme Court of Ohio has decided the instant case in a manner which is repugnant both to this principle and to the Constitutional, Treaty or Convention and Statutory provisions involved. The decision is, in fact, a direct denial of the supremacy found by the District Court in the *Lockheed Air Terminal* case, *supra*, and declared by Congress in the statutes recited.

II. The Questions Presented Are of Substantial Importance in the Growth and Development of Constitutional Law.

That the first question is substantial, as well as important, becomes readily apparent from the consideration given the statutory scheme in the *Lockheed Air Terminal, Inc.* case, *supra*. The conclusion of sovereign supremacy expressed in that case is conclusive of the proposition that petitioners cannot truly acquire any property interest in the navigable airspace of this country. That being the case, consideration of this question is of great significance throughout the country, since local groups such as petitioners should not be required to expend public funds in the vain attempt to acquire property rights in territory where the United States has sovereignty to their total exclusion.

The parallel to this case, the first question, and the conclusion reached in the *Lockheed Air Terminal* case, *supra*, is to be found within the framework of the decision in the case of *United States v. California*, 332 U.S. 19, wherein this Honorable Court, at page 36, of the opinion, in discussing a parallel situation cites *United States v Causby*, 328 U.S. 256, 90 L. Ed 1206, in reaching its conclusion with respect to ownership. This conclusion with respect to national sovereignty is further supported by

the decisions reached in *United States v. Texas*, 339 U.S. 707, and *United States v. Louisiana*, 339 U.S. 699, 704.

The second question arises by reason of the principle of immunity announced in the case of *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 at 20 and 21. It is similarly asserted that this question presents a question of first impression in that a municipality and its officials claim the benefit of this immunity by virtue of their being agents of the United States, as was established by the supporting documentation submitted with petitioners' motion for summary judgment filed in this case.

The question is important because it presents the first time since the express principle of immunity was announced in *Yearsley, supra*, that a municipality has claimed the benefits of such immunity. The Ohio Supreme Court decided that this principle of immunity had been litigated and considered by this Court in the *Griggs* case, *supra*; however, examination of that case does not disclose that the airport involved had claimed such immunity, nor does it appear that this Honorable Court considered the principle. It therefore appears, if this principle of immunity has any validity then petitioners are being deprived of the right to such immunity in a case where the Supreme Court of Ohio did not find that such authority had been exceeded nor validly conferred.

It is submitted that the decision rendered by the Supreme Court of Ohio fails to give recognition to Section 6, as amended of the Civil Aeronautics Act of 1938; fails to give any recognition to Sections 1508(a) and 1301 (24), of the Federal Aviation Act; fails to give any recognition to the declaration contained in Article I, of the Pan American Convention, to which the United States was a party and, in effect, authorizes petitioners to acquire property rights in sovereign territory of the United States. Petitioners believe that the questions presented

by this petition are both substantial and important, particularly in light of the fact that this Honorable Court still adheres to the constitutional principle announced in *Missouri v. Holland, supra,* and in the light of the clear pronouncement of sovereign supremacy in the *Lockheed Air Terminal* case, *supra.*

We have not only arrived at a time when the sovereignty and supremacy of the United States is a recognized and accomplished fact, but it has also come to pass that the United States will require petitioners to obtain a Certificate (license) in order to continue operating. [See Section 51(b)] of the Airport and Airway Development Act of 1970, Public Law 91-258, 84 Stat. 219.] Under these circumstances National Sovereignty in the navigable airspace is a fact.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A

THE STATE, EX REL. BOWER ET AL., *v.* CITY OF COLUMBUS ET AL.

[Cite as State, ex rel. Bower, v. Columbus (1971), 27 Ohio St. 2d 7.]

Appropriation of property for public use—Low and frequent airflights interfering with enjoyment of land—Constitute a "taking"—Mandamus available, when.

(No. 70-783—Decided June 30, 1971.)

IN MANDAMUS.

This is an action in mandamus originating in this court.

Relators are property owners in the Wonderland Addition in the city of Columbus and are similarly situated in relation to the Columbus International Airport as were the property owners in *State, ex rel. Royal v. Columbus* (1965), 3 Ohio St. 2d 154, certiorari denied, 383 U. S. 925, and *State, ex rel. Partlow, v. Columbus* (1970), 22 Ohio St. 2d 1.

As did relators in *Royal* and *Partlow*, relators here seek to compel respondents to institute appropriation proceedings for the purpose of determination of compensation due for property rights allegedly taken from them as a result of frequent and low-level flights of aircraft in connection with the operation of the Columbus International Airport.

Respondents contend, as they did in *Partlow*, that there is a national sovereignty in air space "over which the United States exercises complete and exclusive jurisdiction."

Additionally, respondents claim that they are immune from liability in that they retain only a maintenance au-

thority in connection with the airport operation and are without authority in connection with the right to control flight operations, which right remains in the hands of the United States as administered through the Federal Aviation Administration. Respondents' claim of immunity is thus predicated on their being the agents of the United States.

Mr. Dwight L. Fullerton and *Mr. Alan C. Travis*, for relators.

Mr. John C. Young, city attorney, *Mr. William J. Melvin* and *Mr. Thomas A. Bustin*, for respondent.

Per Curiam. In *Partlow*, the national air space defense was before this court, which allowed the writ of mandamus on authority of *Royal* and *Griggs v. Allegheny* (1962), 369 U.S. 84. In *Partlow*, respondents, as here, also contended that the United States was a necessary party.

While respondents now raise the more precise question of immunity based upon the complete right to control by the federal government, it appears clear that even this specific question was considered in *Griggs*, where the court stated at page 89:

"It is argued that though there was a 'taking,' someone other than respondent was the taker—the airlines or the C. A. A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. * * * The federal government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located."

We find no significant difference in the "circumstances" in *Griggs*, as regard federal-local responsibilities to those presented here.

The writ of mandamus is allowed on authority of *Royal, Partlow* and *Griggs.*

Writ allowed.

O'NEILL, C. J., SCHNEIDER, HERBERT, DUNCAN, CORRIGAN, STERN and LEACH, J.J., concur.

APPENDIX B

IN THE SUPREME COURT OF OHIO

No. 70-783

STATE OF OHIO, EX REL.,
FRANK W. BOWER, ET AL.,
Relators,

vs.

CITY OF COLUMBUS, OHIO, ET AL.,
Respondents.

ENTRY OF CERTIFICATION

The above cause originated in this court as an original action in mandamus.

It is hereby certified and made a part of the record, judgment and entry in this cause that:

1. In the prosecution of the above cause respondents, as a second defense contained in their answer, insisted and relied upon the defense that this court did not possess the jurisdiction to compel the respondents to exercise a sovereign power of eminent domain possessed by the City of Columbus to acquire an air easement through the navigable air space involved in the case due to the fact that such air space, by reason of Article II, Section 2(2) of the United States Constitution, Article I, Section 8(3) (18) of the United States Constitution, Article VI(2) of the United States Constitution; by reason of the Law of Nations which the United States observes as a National State; by reason of Article I of the Pan-American Convention of 1928; by reason of Section 6, as amended, of the Civil Aeronautics Act of 1938; by reason of Section

1108 of the Federal Aviation Act of 1958; by reason of Section 101(24) of the Federal Aviation Act of 1958, is the sovereign territory of the United States.

2. It is further insisted and relied upon by respondents in the third defense contained in their Answer and in a Motion for Summary Judgment that they were merely an agent of the United States; exercising maintenance authority conferred upon them by the United States through the Federal Aviation Administration and Federal Aviation Act of 1958, and that by reason of such fact, they were immuned from liability in carrying out the will of Congress.

In the determination of this cause it became material to determine both questions, which questions were determined adversely to respondents, as appears in the opinion and entry heretofore made herein.

On request of respondents, this certification is made a part of the record, judgment and entry in this cause.

It is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case could be had.

C. WILLIAM O'NEILL,
Chief Justice.

APPENDIX C

Constitution of the United States

Article II, Section 2(2)

"He shall have Power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate and by and with the advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Article I, Section 8(3) and (18)

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article IV, Section 3(2)

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Article VI (2)

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all

Treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of the State to the contrary notwithstanding."

PAN-AMERICAN CONVENTION

Article I:

"The high contracting parties recognize that every state has complete and exclusive sovereignty over the air space above its territory and territorial waters."

CIVIL AERONAUTICS ACT OF 1938

Section 6(a), as amended:

"(a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal seas, bays and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State."

FEDERAL AVIATION ACT OF 1958

Section 1301 (24): Navigable Airspace

"'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft.'"

Section 1508(a): Declaration of National Sovereignty

"(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State."